No. 12772

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

DEAN ACHESON, as Secretary of State of the United States of America,

Appellant,

vs.

MARIKO KUNIYUKI,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

HONORABLE PEIRSON M. HALL, *Judge*

APPELLANT'S REPLY BRIEF

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APPELLANT'S REPLY BRIEF

STATEMENT

Since the filing of our opening brief and after the service of appellee's typewritten brief, filed and served under authority contained in the order of this honorable court, two Southern California District Judges have definitely held that Japan is a "foreign

state" and that the elections in Japan were "political elections." District Judge William M. Byrne, on March 5, 1951, in an opinion filed in Los Angeles, in the case of *Akio Kuwahara v. Acheson*, No. 10095 (f) where an American-born Japanese voted in the Japanese elections of 1946 and 1947, held on this question:

> "The Court is bound by the determination of the Executive Department as to whether or not Japan was a 'foreign state' at the time the plaintiff voted in the elections of Japan, and may not make an independent determination on the basis of evidence introduced at the trial relating to the manner in which the government is conducted. *Jones v. United States*, 137 U.S. 202; *Williams v. Suffolk Insurance Co.*, 13 Pet. 415.

Citing also Wigmore on Evidence, third edition, Volume IX, Section 2566.

Further the court said:

> " * * * The government of the United States, prior to the outbreak of the war with Japan on December 7, 1941, recognized Japan as a 'foreign state' and has continued to do so to the present time. This court is bound by that recognition.
>
> To hold that Japan is not a foreign state is to say that a citizen of the United States may not only vote with impunity in Japanese elections, but also without loss of citizenship apply for and obtain naturalization in Japan. (See Sec. 801 (a)); take an oath of allegiance to Japan, (see Sec. 801(b)); accept office in the government

> of Japan (see Sec. 801 (d)); make a formal renunciation of his United States citizenship in Japan (see Sec. 801(f)). Surely Congress could not have intended that such actions, if voluntarily done, would leave United States citizenship unaffected."

On this same subject, United States District Judge Leon R. Yankwich, of the California District Court sitting temporarily in the Western District of Washington, Northern Division, in an opinion filed in Cause No. 2154, *Hichiro Uyeno v. Acheson*, on March 23, 1951 said this:

> " * * * it is obvious that the words 'foreign state' are not words of art. In using them the Congress did not have in mind the fine distinctions as to sovereignty of occupied and unoccupied countries which authorities on International Law may have formulated. They used the word in the sense of 'otherness.' When the Congress speaks of 'foreign state,' it means a country which is not the United States or its possession or colony — an alien country — other than our own, bearing in mind that the average American when he speaks of a 'foreigner' means an alien, — un-American. * * * *
>
> So, the interpretation called for is that of common speech and not that derived from abstract speculation on sovereignty as affected by military occupation.
>
> Such abstraction would make out of present-day Japan a 'no-man's-land,' neither part of America, nor a part of the domain of the allied nations occupying it for pacification purposes. However, if Japan is considered as a 'foreign

state' in the accepted popular sense, which also has the sanction of international law, it has a *distinct being*, separate and apart from the occupying powers and capable of commanding allegiance which is incompatible with American nationality. Because of such incompatibility, the Congress must have considered it in the same sense — when it designated participation by an American national in a political election in a 'foreign state' as one of the means of losing his American nationality.

And the State Department has so interpreted it.

For these reasons, I am in disagreement with the cases on the subject, including *Arikawa v. Acheson*, 1949, D.C. Cal., 83 F. Supp. 473 and *Furusho v. Acheson*, 1951, D. C. Hawaii 94 F. Supp. 1021, which by stressing the military control of Japan, insist that, *as an occupied country*, Japan is not a foreign state. There is sound international authority for the view that military occupation of a country does not *ipso facto* terminate the life of the country as a separate entity (1-Hackworth, Digest of International Law P. 127; Oppenheim International Law 6th Ed. (Lauterpocht, pp. 147 - 150)). If we were dealing with an ancient type of occupation which resulted in the dissolution of the defeated power and its complete absorption by the victor, it might well be argued that such occupation effectively destroyed the existence of the conquered country and made it a part of the territory of the conqueror. But neither the United States nor the powers allied with it in occupying Japan did, or intended to dissolve Japan as a unit, or make it a part of the United States, or of the group of nations which the allied occupation represents. Indeed, the Emperor of Japan was allowed to remain as titular head of

the state. Certain changes were made in the structure of its government by a constitution which conformed to the desires of the conquerors. But the life of the nation as such went on with its language, customs, mores, family institutions and even local instrumentalities of government. The latter, of course, modified by the exigencies of the new Constitution. So that, regardless of any abstract theorizing about the effect of military occupancy upon a conquered nation, the fact remains that the allied authorities have not, and do not intend to, dissolve Japan as an entity and absorb it into some other yet unnamed entity. Rather, Japan is to be returned to its inhabitants to whom it belongs, after a temporary trusteeship (see *Neely v. Henkel*, 1901, 180 U.S. 109, 115, 120.) To hold that, by the mild type of occupation, Japan ceased to be a foreign state is, to my mind, unwarranted by the realities of the occupation, as well as those recognized rules of international law which determine the essence of statehood (see 1 Hyde, International Law, Second Revised Edition pp. 22-23). More, as already stated, the Congress of the United States, by using the phrase 'foreign state' meant to indicate a country other than our own, actions as to which might result in loss of nationality because it evidenced the allegiance which the United States has so consistently considered the essence of nationality.

So that the conclusion is inescapable that in 1947 when the plaintiff voted in the Japanese elections, Japan was a 'foreign state' within the meaning of Section 801(e). (See *Neely v. Henkel*, supra, at p. 115; *Pearcy v. Stranahan*, 1907, 205 U.S. 257, 265-272; *Burnet v. Chicago Portrait Co.*, 1932, 285 U.S. 1, 5-7)."

On the question of the nature of the Japanese

elections, both Judges Byrne and Yankwich agree that they were "political elections."

In his opinion in the Kuwahara case, Judge Byrne said this:

> "The Nationality Act of 1940 was drafted by a committee of advisors appointed by the Secretary of State, Secretary of Labor and the Attorney General pursuant to Executive Order No. 6115 of April 25, 1933. On June 1, 1938 these cabinet officers made a report to the President, which the President in turn submitted to the Congress on June 13, 1938. The following is the committee's explanatory comment on Sec. 401(e):
>
> > 'The meaning of the sub-section seems clear. It is applicable to any case of an American who votes in a political election in a foreign state *whether or not he is a national thereof.*
> >
> > Taking an active part in the political affairs of a foreign state by voting in a political election therein is believed to involve a political attachment and practical allegiance thereto which is inconsistent with continued allegiance to the United States whether or not the person in question has or acquires the nationality of the foreign state. In any event, it is not believed that an American national should be permitted to participate in the political affairs of a foreign state and at the same time retain his American nationality. The two facts would seem to be inconsistent with each other.'
>
> It should be noted that no special significance was attached to the words 'political election.' It seems clear that they were intended to be used in their ordinary sense. * * *"

Judge Yankwich, in his opinion, used practically the same reasoning.

In both cases, however, the court, from the evidence adduced, reached the conclusion that because of special circumstances the parties involved did not vote voluntarily, and therefore did not lose their American nationality.

Judge Byrne, in the Kuwahara case after quoting Webster's definition of the word "voluntary," said:

> " 'Involuntary' is the antonym of 'voluntary' and has the opposite meaning.
> The question, then, is whether plaintiff's action is voting in the elections was an act of his own choice, unimpelled by the interference or influence of others.
>
> In applying this test the quantum of influence which would remove the act from the sphere of free choice would vary according to the character of the act."

The court then goes on in giving five distinctions, and with relation to the testimony in that case said:

> "The plaintiff testified it was announced over the radio 'this is the first election since the war and everyone should vote,' that all would be given a 'half day off' for that purpose. That someone told him that 'I might lose ration card if I did not vote,' that an Australian soldier stationed where plaintiff worked, speaking through an interpreter, said, 'today is election — you be given half-day off — go to vote.'

> Standing alone these statements would not constitute duress or coercion, but when considered with the general conditions existing in Japan at the time, they present an entirely different meaning. The evidence depicts a situation in Japan during the years 1946 and 1947 in which the minds of the inhabitants were adjusted to the realization that the occupation authorities were all powerful and to displease them would result in grave consequences."

The court then, in some detail, goes on to say what General MacArthur and the occupation authorities had to say about the importance of the election and quotes from an exhibit containing a public statement made by Lt. Colonel Ryan, said to be typical:

> "The voters have no right to delegate their power of selection to any small group. If they do this they are failing to meet their obligations and deserve what may befall them — non-representative government. Let every man and woman who has the vote exercise that right and make the coming election a truly democratic one."

(We quote this public statement referred to by Judge Byrne because a similar document was introduced in the instant case.)

In the other case, Judge Yankwich arrived at a similar conclusion, stating:

> "The plaintiff was before the court and testified at length about the circumstances under which he was coerced into voting. * * * The dividing

> line between voluntary action and coercion is not easy to draw. * * *
>
> In the present case, the testimony of the plaintiff is that he felt that the constant reiteration through newspapers and over the radio and by friends and advisors of the importance of voting and the need for voting was taken by him as a 'command' on the part of General MacArthur and the occupation forces to vote, *which he could not disobey.* Indeed, he testified that in addition to this he was led to believe that if he did not vote he would lose his food ration card. * * *"

Both those cases however, on the question of the character of the act differ from the case at bar.

ARGUMENT IN REPLY TO APPELLEE

Counsel for appellee cites *Perkins v. Elg*, 307 U.S. 325, 327 for the statement

> "Rights of citizenship may not be impaired by ambiguity."

which, of course, was perfectly proper as applied to the facts in that case.

Here, however, there is nothing ambiguous in the plain language used by the Congress when it provided that:

> "A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by
> * * *
>
> (e) voting in a political election in a foreign

> state or participating in an election or plebiscite to determine the sovereignty over foreign territory." (T. 8, Sec. 801 U.S.C.A.)

It is well to remember also that by the provisions of Section 803, Title 8, U.S.C.A. the Congress, to more specifically provide an age limit restriction on expatriation, provided:

> "(b) No national under eighteen years of age can expatriate himself under sub-sections (b) to (g) inclusive of Section 801."

The amendment of 1944 did not change this sub-section insofar as sub-section (e) of Section 801 is concerned.

Further, Section 801 (e) has been declared by this court to be constitutional as has Section 803. *Miranda v. Clark* (9 Cir.) 180 F. (2d) 257.

In the instant case appellee was 28 years old when she voted, surely an age when one should know one's own mind.

Her age, at the time of voting, is important as bearing upon her attachment to Japan as against her attachment to the United States in view of the fact that in all of her 34 years of life, as well as the fact that in 1940 or 1941 she married a Japanese national, apparently at that time concluding to make Japan her permanent home. This husband died in 1944.

As said by Judge Bone in the Miranda case, supra:

> "After arriving at that age (18) a voluntary act of expatriation binds him."

The Tule Lake case *(Acheson v. Marakani*, 176 F. (2d) 953 (9 Cir.)) can have no possible bearing on the instant case.

We submit, in answer to the point made at p. 21 of appellee's typewritten brief, that in the instant case appellee's attachment to Japan as against her attachment to the United States is clearly demonstrated by the following:

(a) That of her 34 years of life on this earth, but a total of two years and eight months was spent in this country.

(b) She returned to this country for a visit in 1940 when she was 24 years of age and remained only eight months when she returned to Japan and married a Japanese national, not an American born Japanese, but one who was engaged in farming. This husband died in 1944.

(c) She voted in the Japenese elections in 1946 and 1947 when she was 30 and 31 years of age respectively.

(d) She positively testified she was neither coerced nor in anywise compelled to vote.

Of course, after the fact, it is an easy matter for one to say that one did not intend the natural consequences of his act and that one was influenced in his actions by the conduct of others, but after all is said and done intent is determined by conduct and actions immediately proceeding and at the time of the act, and if what we have pointed out as appellee's acts and conduct prior to and at the time of the act is not sufficient to clearly demonstrate intent, then we might throw to the winds such acts and conduct and take as true the uncorroborated statement of one who in self interest says his intent differed from his actual conduct, which to say the least, would be revolutionary.

It is true that American citizenship is a valuable right, but when the Congress has spoken in no uncertain terms as to how that citizenship may be lost, as Judge Bone so clearly said in the *Miranda* case, supra:

> " * * * the statutory provisions above quoted leave no doubt the Congress thereby removed and intended to remove the barrier to a voluntary expatriation by a national who is over the age of eighteen years. After arriving at that age a voluntary act of expatriation binds him. * * *"

we feel that appellee's acts and conduct before and at the time she voted in Japan clearly indicate that what is now, for the first time, claimed to be the

impelling force which made her voting in the two Japanese elections appear to be an unadulterated afterthought and should be given no credence whatever.

Counsel cite *MacKenzie v. Hare.* 239 U.S. 299, 311 for the proposition that a change of citizenship cannot be arbitrarily imposed, that is, imposed without concurrence of the citizen.

What the Supreme Court there said was trite:

> "It may be conceded that a change of citizenship cannot be arbitrarily imposed, that is imposed without the concurrence of the citizen. The law in controversy does not have that feature. It deals with a condition voluntarily entered into with notice of the consequences. We concur with counsel that citizenship is of tangible worth and we sympathize with plaintiff in her earnest assertion of it. *But there is involved more than personal considerations. As we have seen, the legislation was urged by conditions of national moment.* And this is an answer to the apprehension of counsel that our construction of the legislation will make every act, though lawful, as marriage, of course is, a renunciation of citizenship. The marriage of an American with a foreigner has consequences of like kind, may involve national complications of like kind as her physical expatriation may involve. Therefore, as long as the relation lasts it is made tantamount to expatriation. This is no arbitrary exercise of government. It is one which, regarding the international aspects, judicial opinion has taken for granted would not only be valid but demanded. It is the conception of the legisla-

> tion under review that such an act may bring the government into embarrassments and it may be into controversies. It is as voluntary and distinctive as expatriation and its consequences must be considered as elected.
> Judgment affirmed."

That was a case where a native born American lost her citizenship by marriage to an Englishman. She insisted that because she was native born she was entitled to register and vote in San Francisco. The commissioners of San Francisco would not permit her to register as a voter because of her marriage to an alien. She sought mandamus which was denied. The United States Supreme Court granted review with the above result.

That case is somewhat analagous to the instant case in that the act of expatriation there was the marriage to a foreigner which could be nothing but voluntary, while here we have acts and conduct prior to and at the time of the voting which the Congress has prescribed as one of the grounds of expatriation together with the long term of residence in Japan.

Undoubtedly the visit to the United States in 1940 was brought about by the desire of appellee to once more see her parents before her marriage to a native Japanese in Japan and the making of her permanent home in that country. Further than that, it must have been known to appellee at the time that

Japan was making ready for war upon the United States, because it is a matter of common knowledge that about that time and before Pearl Harbor there was an almost mass exodus of Japanese from the United States to Japan, and it is hard to believe that any person of Japanese extraction did not in his own mind believe that Japan would win the war, and it is fair to assume that appellee was of the same mind. She never did learn the English language, or so far as the evidence in this case is concerned, did she, in all the years she was in Japan, make any effort to learn American ways and customs. Certainly her two years after birth in the United States afforded her no opportunity of observation at that tender age, and the eight months spent in this country in 1940 did not and could not avail her very much along that line.

By the Act of July 27, 1868, 15 Stat. 223, 8 U.S.C. Sec. 800, the Congress declared that the "right of expatriation is a natural and inherent right of all people, indispensible to the enjoyment of the rights of life, liberty and the pursuit of happiness."

In the case of *Savorgnau v. United States*, 171 F. (2d) 155, the Court of Appeals for the Seventh Circuit had this to say at page 159:

"Applying this construction of the statute to the

> instant facts, the conclusion is inescapable that the plaintiff, by voluntarily becoming naturalized under Italian law, lost her American citizenship *regardless of whether she knowingly renounced or relinquished that citizenship. Conceding that her motive was solely to obtain consent of the Italian government to her marriage and that she was misinformed as to the legal consequences of her conduct, the fact remains that she consciously and voluntarily applied for and obtained naturalization in a foreign state* which, under the provisions of the statute, effected a loss of her American citizenship.
>
> The motive for her conduct is distinguishable from her intent to act as she did. *Such motive has no bearing on the determination of this question.* Nor is the fact that she was misinformed or mistaken as to the legal consequences of her conduct of any significance here. *One cannot avoid the force of a statute by asserting a mistaken conclusion as to its sanctions or effects.* If these factors were permitted consideration, the operation of the statute would depend not upon the voluntarily performed act of becoming naturalized in a foreign state, *but upon the extent of the legal knowledge and the subjective intention or motivation of the person involved. Such tests cannot be used* to determine the operation of the statute."

This language could well be paraphrased in the case of appellee in this case. It goes directly to the meat of the whole question. The case differs from this one only in the particular sub-section of the statute involved. The principle of law there annunciated is as applicable to appellee here as it was in Mrs. Savorgnau's case.

The United States Supreme Court affirmed, 338 U.S. 491.

In the Savorgnau case (73 F. Supp. 110) the trial court found that, at the times of signing her application for Italian citizenship and the instrument containing her oath of allegiance to the King of Italy, *she did not* intend to establish a "permanent residence" in any country other than the United States. It found also that when she left America for Italy "she did so without any intention of establishing a permanent residence abroad or abandoning her residence in the United States or of divesting herself of her American citizenship."

These are the precise claims of the appellee in this case.

CONCLUSION

We respectfully submit, therefore, that upon the authorities cited in our opening brief and in this reply brief, that the conclusion is inescapable that the judgment in this case should be reversed and appellee decreed to have lost her American nationality by voluntarily voting in the political elections in Japan.

Respectfully submitted,

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